

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 74-1955

To be argued by  
E. THOMAS BOYLE

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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:  
UNITED STATES OF AMERICA,  
:  
:  
Appellee,  
:  
:  
-against-  
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:  
RICHARD BELANGER,  
:  
:  
Appellant.  
:  
:  
-----X

Docket No. 74-1955

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P/S

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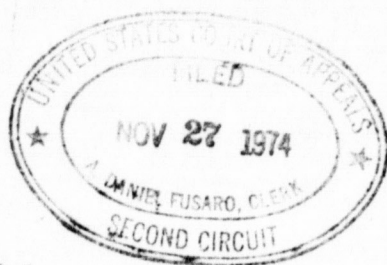
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APPENDIX TO APPELLANT'S BRIFF

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY,  
Attorney for Appellant  
RICHARD BELANGER  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Court House  
Foley Square  
New York, New York 10007  
(212) 732-2971

E. THOMAS BOYLE,  
Of Counsel

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PAGINATION AS IN ORIGINAL COPY



TITLE OF CASE		ATTORNEY
THE UNITED STATES		For U. S.:
vs.		Daniel Pykett, AUSA
JAMES ADAMS		264-6394
RICHARD BELANGER ~		
NICHOLAS CALABRO		
DOMINIC MECCA		
RICHARD PALMER ~		For Defendant:
STEVEN SMITH		
GARY STEPHAN		
PAUL STEPHAN		
ROBERT VISSA		
ROBERT WILNER and JOHN DCE, a/k/a Anthony		

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DP
(07)					
Fine,					
Clerk,					
Marshal,					
Attorney,					
<del>Continued on</del> T. 21					
<del>Continued on</del> 846,963,841(a)(1),(b)					
Distr. & possess. w/intent to					
distr. Marihuana, I(Ct.2)					
Consp. so to do.(Ct.1)					
(Two Counts)					

DATE	PROCEEDINGS
12-7-73	Filed indictment:
12-17-73	Adams( No appearance by attorneys. Court directs entry of Mecca( not guilty plea. Calabro( Belager( John Doe( Vissa( Smith( Mecca- continued on bail fixed by Mag. (\$10,000. secured by \$500.) Palmer-(atty. present) Pleads not guilty. Cont'd on bail fixed by M (10,000P.R.B. secured by 10 %) (Cont'd)

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
12-17-73	Wilner(atty. present) Pleads not guilty. Bail continued \$5,000. P.R.B.)		
	Gary AND Paul Stephan(Court directs entry of not guilty Plea. Bail continued as set by Mag. Paul Stephan \$10,000. P.R.B. secured by \$500. and Gary Stephan \$10,000. P.R.B. secured by 10%.		
	Motions returnable in 30 days. Case assigned to Judge Lasker for all purposes. Frankel, J.		
1-7-74	RICHARD PALMER - Filed notice of appearance by Warren B. Sibericlett, 200 Mumaroneck Ave. White Plains, N.Y. 10601 914-RO 1-1771.		
1-9-74	VISSA - PLEADS NOT GUILTY - P.R.B. of \$2,500.		
	BELANGER - Pleads not guilty - P.R.B. \$2,500.		
	CALABRO - Pleads not guilty.		
	WILNER - Pleads not guilty. LASKER, J.		
1-11-74	SMITH Deft. Pleads not guilty - P.R.B. \$2,500. LASKER, J.		
1-15-74	ROBERT VISSA - Filed deft. motion to inspect Grand Jury Minutes Dismissing indictment, Granting B/P, etc. (with statement) (N <sup>O</sup> affdvt.)		
2-1-74	PAUL STEPHAN - Filed notice of motion and affdvt. for discovery.		
2-1-74	PAUL STEPHAN - Filed memo of law.		
2-19-74	DOMINIC NECCA - Filed notice of motion for b/p, & affdvt. in support.		
1-21-74	STEPHEN SMITH. Filed CJA Form # 20, appointment of counsel Stuart R. Shaw, 233 B'Way., NYC. 10007 233-8991. LASKER, J.		
2-1-74	Filed the following papers received from U.S. Magistrate: Docket Sheet, Indictment Warrant, Disposition Sheet, Notice of Appearance and Appearance bond G.S. \$10,000, D.M. \$10,000., R.P. \$10,000., R.W. \$5,000., P.S. \$10,00, N.C. \$10,000., R.B. \$2,500.		

Cont'd on page 3



DATE	PROCEEDINGS
3-15-74	RICHARD PALMER - Filed order extendint bail limits to Carribean & South Amer from March 31-74 and to including 4-20-74. LASKER, J.
3-20-74	Filed Govt's memo of law in opposition to various motions.
4-3-74	STEPHEN SMITH - Filed notice of motion for B/P. Ret. 4-15-74. With Affdvt.
4-24-74	STEPHEN SMITH - Filed affdvt. and notice of motion for dismissal of indictme ret. 5-3-74. Affdvt. in support.
4-26-74	ROBERT WILNER - Filed deft. affdvt. and notice of motion pursuant to R.14; R
4-26-74	ROBERT WILNER - Filed deft. memo of law.
5-3-74	STEPHEN SMITH. - Filed defts. memo of law in support of motion to dismiss indictment.
5-10-74	JAMES ADAMS - Filed CJA Form # 21 Authorization and voucher for transcrip.
6-20-74	RICHARD PALMER= Filed Judgment & Order of Probation - /674,558) imposition of sentence of imprisonment is suspended and the Deft is placed o Probation for a period of THREE (3) YEARS subject to the standing probation order of the court and the Deft is FINED the sum of \$2,500.00 to be paid within ninety (90) days hereof or the Deft is to stand committed. Count two is dismissed on the motion of the Deft. --- LASKER, J.
5-6-74	RICHARD PALMER= (AUSA Pykett) Deft, (Atty present) pleads GUILTY to Count 1. Pre-sentence report ordered. Sentence date 6-14-74. Deft. R.O.R. DOMINIC MECCA= Severed.
5-7-74	Jury Trial begun for Deft's= BELANGER, CALABRO, SMITH, G. STEPHAN, P. STEPHAN VISSA, & WILNER. - LASKER, J.
5-8-74	Trial cont'd.
5-9-74	Trial cont'd.
5-10-74	Trial cont'd.
5-13-74	Trial cont'd.
5-14-74	Trial cont'd.
5-15-74	Trial cont'd.
5-16-74	Trial cont'd.
5-17-74	Trial cont'd.
5-20-74	Trial cont'd.
5-21-74	Trial cont'd.
5-22-74	Trial cont'd.
5-23-74	trial cont'd. Deft's CALABRO & SMITH, count 2 of indictment dismissed, order LASKER, J.
5-24-74	Trial cont'd - Jury started deliberaltion at 4 PM and reached a verdict. R.BELANGER - found GUILTY on Ct.1 & 2. Pre-sentence report ordered. Date for sentence is July 12, 1974 @ 10 AM. R.VISSA - found GUILTY on Cts.1 & 2. Pre-sentence report ordered. Date for sentence is July 12, 1974 @ 10 AM. R.WILNER - found GUILTY on Cts.1 & 2. Pre-sentence report ordered. Date for sentence July 12, 1974 @ 10 AM.

DATE	PROCEEDINGS
	N. CALABRO - Found NOT GUILTY On COUNT 1.
	S. SMITH - Found NOT GUILTY On COUNT 1.
	G. STEPHAN - Found NOT GUILTY On COUNTS 1 & 2.
	P. STEPHAN - Found NOT GUILTY On COUNTS 1 & 2. --- LASKER, J.
JUN 10-74	Filed transcript of record of proceedings, dated MAY 7, 8, 9, 10, 13, 14, 1974.
JUN 10-74	Filed transcript of record of proceedings, dated MAY 15, 16, 17, 20, 21, 1974.
JUN 10-74	Filed transcript of record of proceedings, dated MAY 22, 23, 24, 1974.
7-12-74	RICHARD BELANGER= Filed Judgment & Commitment = it is Adjudged that the Deft. is hereby committed to the custody of the Atty. General for imprisonment for a period of ONE (1) YEAR, on each of counts 1 & 2, said sentence to run concurrently and not consecutively. At the expiration of such custody the Deft. shall serve a SPECIAL PAROLE term of TWO(2) YEARS subject to the provisions of Title 21, Sec. 841 (a)(1)(B).---LASKER, J.
7-12-74	ROBERT VISSA= Filed Judgment & Commitment= It Is Adjudged that the Deft. is hereby committed to the custody of the Atty. General for imprisonment for a period of ONE(1) YEAR and on the condition that the Deft. be confined in a jail or treatment type institution for a period of SIX (6) MONTHS, the execution of the remainder of the sentence of imprisonment is suspended and the Deft. placed on probation for a period of SIX (6) MONTHS subject to the standing probation order of this court, and thereafter to a TWO (2) YEAR SPECIAL PAROLE period subject to the provisions of Title 21, Sec. 841 (b)(1)(B). Said sentences are to be served concurrently and not consecutively.--- LASKER, J.
7-12-74	RICHARD BELANGER= Filed Notice of Appeal to U.S.C.A., 2nd Circuit from the <sup>/final</sup> Judgment of conviction dtd 7-12-74. Deft. granted permission to file appeal in formi pauperis. LASKER, J. (Copies Mailed)



UNITED STATES OF AMERICA,

INDEXED

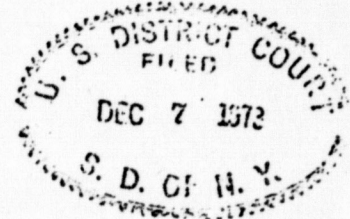
73 Cr.

JUDGE LAMER

73 Cr. 1102

JAMES ADAMS,  
RICHARD BELANGER,  
NICHOLAS GALABRO,  
DOMINIC RECCA,  
RICHARD PALMER,  
STEVEN SMITH,  
GARY STEPHAN,  
PAUL STEPHAN,  
ROBERT VISSA,  
ROBERT WILNER, and  
JOHN DOE, a/k/a "Anchovy",

Defendants. :



The Grand Jury charges:

1. From on or about the 1st day of August, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JAMES ADAMS, RICHARD BELANGER, NICHOLAS GALABRO, DOMINIC RECCA, RICHARD PALMER, STEVEN SMITH, GARY STEPHAN, PAUL STEPHAN, ROBERT VISSA, ROBERT WILNER, and JOHN DOE, a/k/a "Anchovy", the defendants, and Gerald Mitchell and Richard Thuclo, named herein as co-conspirators and not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly herein distributed and passed with intent to distribute Section 812 and 841 narcotic drug controlled substances to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

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3. It was the purpose of said conspiracy to cause the defendant to enter, unlawfully and unlawfully, the territory of the United States from a place outside thereof and import into the United States a plane outside thereof. Schedule 1 of the Narcotic Drug Controlled substances in violation of Sections 952(a), 960(a)(1) and 960(b)(1) of Title 21, United States Code.

#### OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. In or about August, 1971, defendants PAUL HARRIS, ROBERT WILNER and co-conspirators Richard Thulow went to Montego Bay, Jamaica, West Indies by boat.

2. In or about February, 1973, defendants JAMES ADAMS, ROBERT WILNER and RICHARD EELANDER met and had a conversation in Florida.

3. In or about February, 1973, the defendant JAMES ADAMS paid defendant ROBERT WILNER approximately \$12,000.

4. In or about February, 1973, defendant ROBERT WILNER, as agent for Air Seas Charter Service, Inc., purchased a 24 foot Piotech Seacraft boat in Ft. Lauderdale, Florida.

5. On or about March 6, 1973, defendant ROBERT WILNER and co-conspirator Richard Thulow landed a boat in Miami, Florida.



6. On or about March 7, 1973, defendant ROBERT WILMER and co-conspirator Richard Thurlow, removed approximately 700 lbs. of marijuana on Williams Island, Bahamas Islands.

7. On or about May 13, 1973, defendants ROBERT WILMER and JOHN DOE, a/k/a "Anthony", boarded an airplane at John F. Kennedy International Airport in the City of New York and flew to Ft. Lauderdale, Florida.

8. In or about May, 1973, defendant JOHN DOE, a/k/a "Anthony", and co-conspirator Gerald Mitchell drove from Ft. Lauderdale, Florida to the Rye Town Hilton Hotel in Portchester, Westchester County, New York.

9. In or about May, 1973, defendants ROBERT WILMER, DOMINIC MECCA and JOHN DOE, a/k/a "Anthony", and co-conspirator Gerald Mitchell met at the Rye Town Hilton Hotel in Portchester, Westchester County, New York and had a conversation.

10. In or about June, 1973, defendants ROBERT VISSA and NICHOLAS CALABRO and co-conspirator Gerald Mitchell drove from the State of Maine to Stamford, Connecticut where they met and had a conversation with defendants JOHN DOE, a/k/a "Anthony" and ROBERT WILMER.

11. On or about June 10, 1973, defendants JOHN DOE, a/k/a "Anthony", and CARY STEPHAN boarded a boat in Ft. Lauderdale, Florida.

12. On or about June 11, 1973, defendant ROBERT WILMER and co-conspirator Gerald Mitchell

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13. On or about June 11, 1973, defendants RICHARD WILMER and ROBERT VISSA landed an airplane on Long Island in the Bermuda Islands.

14. In or about June, 1973, defendants PAUL STEPHAN, DOMINIC MECCA, NICHOLAS CALABRO, ROBERT WILMER, ROBERT VISSA and RICHARD PALMER and co-conspirator Gerald Mitchell met at Pier 66 Hotel, Ft. Lauderdale, Florida and had a conversation.

15. In or about June, 1973, defendants GARY STEPHAN and JOHN DOE, a/k/a "Anthony" returned to Ft. Lauderdale, Florida by boat.

16. In or about June, 1973, co-conspirator Gerald Mitchell possessed approximately 260 pounds of marijuana.

(Title 21, United States Code, Sections 846 and 963.)

#### SECOND COUNT

The Grand Jury further charges:

In or about the month of May, 1973, in the Southern District of New York, JAMES ADAMS, RICHARD BELANGER, NICHOLAS CALABRO, DOMINIC MECCA, RICHARD PALMER, STEVEN SMITH, GARY STEPHAN, PAUL STEPHAN, ROBERT VISSA, ROBERT WILMER, and JOHN DOE, a/k/a "Anthony", the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 500 pounds of marijuana.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)

*Paul J. Curran*  
PAUL J. CURRAN  
United States Attorney

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1 THE COURT: Ladies and gentlemen, I hope I didn't  
2 overwhelm you by saying before that my charge is 40 pages  
3 long. Actually that is by no means a long charge, but it  
4 is long enough. In these days, when the law has become more  
5 complicated than it was in pioneer days, it is highly  
6 desirable for a judge to read his charge so that there is  
7 no doubt in his own mind about what he is going to say,  
8 so that he takes into consideration everything that the parties  
9 want him to bring to the attention of the jury, and so that  
10 the law is stated as clearly as possible.

11 I say all this only because I would prefer to  
12 sit and talk to you the way I am doing now. I think it is  
13 a more effective way of communicating. But I don't think  
14 that I will be able to do that. I also say it because,  
15 since I am going to read my charge, I may get going a little  
16 too fast. If I do, will you please raise your hand so that  
17 I will know and be able to slow down, because I want you to  
18 pay attention carefully to what I have to say in this charge.

19 The game has been played. You have to judge it  
20 now and you have to know what rules to apply to the situation  
21 in order to be able to do justice or render a true verdict  
22 as you swore that you would.

23 Now, ladies and gentlemen, before I commence my  
24 charge proper I want to remind you that as a result of my  
25

1  
2 action, for reasons with which the jury is not concerned,  
3 the following facts are to be remembered:

4 First, I have stricken from the record, and you  
5 are not to be concerned with, any evidence relating to  
6 the events of August, 1971, or August, 1973.

7 Second, since I have excluded from your considera-  
8 tion the events of August, 1971, I have stricken from the  
9 indictment overt act number 1, which relates to those events.  
10 In my charge proper I will point out to you the significance  
11 of the overt acts in the indictment, and when we deliver  
12 the indictment to you we will, in order to be sure that  
13 you do not take overt act number 1 into consideration, blank  
14 it out.

15 Third, I want you to remember that the charges  
16 in count 2 no longer apply to Nicholas Calabra or Steven  
17 Smith.

18 Ladies and gentlemen, now that you've heard  
19 the testimony and the arguments of counsel, the time has  
20 come to instruct you as to the law governing the case. You've  
21 been chosen and sworn as jurors in this matter to try the  
22 issues presented by the allegations of the indictment,  
23 and on your determination of the facts, and I stress the  
24 words "your determination," to decide under the law as I  
25 shall instruct you whether the government has proven any of



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the charges of the indictment against the defendants or any of them beyond a reasonable doubt. I will discuss those charges with you in a moment in detail, but before that I want to give you a few important instructions.

First, that you are to perform your duties as jurors without bias or prejudice to or for anybody, whether the government or any of the defendants. The law does not permit jurors, and you wouldn't want it to permit jurors, to be governed either by sympathy or swayed by prejudice or public opinion. In that connection I want to point out that although this case involves marijuana, the subject matter of the case has nothing to do with your deliberations except that as one of the facts you must find as to the substantive count, count 2, that indeed what was possessed was marijuana, but you do not find the man any guiltier or any less guilty because of the nature of the charge. You only find him guilty if the government proves the elements of the offense which I will specify for you hereafter. So your personal attitudes on the subject about which I examined you at great length, it seems to me, when this jury was chosen, have nothing to do with the issues.

Second, we start with the proposition that we started with at the outset of this trial, that is, that the law presumes every defendant to be innocent of any charge

1       jgh9  
2       against him. You will recall that when you were selected  
3       I specifically asked each one of you if you could enter  
4       into the discharge of your duties presuming each defendant  
5       to be innocent unless proven guilty beyond a reasonable  
6       doubt after your own deliberations, and each of you gave  
7       me the answer yes.

8               This presumption of innocence is sufficient to  
9       acquit any defendant unless and until you as jurors have  
10      unanimously satisfied yourselves beyond a reasonable doubt  
11      of that particular defendant's guilt on that particular charge  
12      from all of the evidence which has been presented. The  
13      burden, or responsibility, is on the government to prove,  
14      if it can, each defendant guilty beyond a reasonable doubt  
15      of every essential element of each crime charged, and I  
16      will of course advise you later in this charge just what  
17      elements there are to each crime.

18             Third, I also want to remind you of what I  
19      mentioned at the outset of the trial, that is, that the  
20      existence of an indictment does not constitute evidence  
21      against any defendant but is merely a method of bringing  
22      a charge against him. The indictment in this case contains  
23      two counts, as you know. Each count contains a separate  
24      crime, which I will describe to you later, and they, the  
25      two crimes, must be considered separately.



Equally it not more important is the observation that the indictment names seven defendants, actually eleven defendants, but seven are on trial. They are the persons whose guilt or innocence you must announce in your verdict. In the determination of innocence or guilt you must bear in mind that guilt is personal. The guilt or innocence of a defendant on trial before you must be determined separately with respect to him, solely on the evidence presented against him or the lack of evidence. The case of each defendant stands or falls upon the proof or lack of proof of the charge against that defendant and not against someone else.

Now, I have said, and the lawyers have said many, many times throughout the case, that the government has assumed the burden of proving each defendant guilty beyond a reasonable doubt. Let me define that important term for you at the outset.

A reasonable doubt is not a vague, speculative or imaginative doubt. It is a doubt which, as the phrase suggests, is based upon reason and which comes either from the evidence that has been put before you, that you've heard and seen, or from the lack of evidence, that you have not heard or seen. It is a doubt which a reasonable man or a woman might entertain. It is a doubt, and I think this is

1 the best definition, which would cause reasonable men and  
2 prudent men and women like yourselves to hesitate to act  
3 in relation to matters of importance in your own private  
4 lives.  
5

6 Let us say that you have an important decision  
7 to make. How do you go about making that decision? You  
8 think about everything you know about it. You think about  
9 everything that you would want to know and you haven't  
10 been told. And you say to yourself, "Do I have enough in-  
11 formation? Do I have enough dependable information so that  
12 I'm ready to act?". If you say I don't, then you have a  
13 reasonable doubt. If you say I do, then you do not.

14 A mere suspicion would not justify a conviction.  
15 Suspicion is not a substitute for evidence. Nor is it  
16 sufficient to convict if you find that the circumstances  
17 merely render the guilt of an accused to be probable.  
18 The law does not deal in probabilities. Since the burden,  
19 or responsibility, is on the prosecution to prove the  
20 accused guilty beyond a reasonable doubt of every essential  
21 element of the crime charged, a defendant has the right to  
22 rely on the failure of the prosecution to establish such  
23 proof and the defendant may also, of course, as in this  
24 case, rely upon evidence brought out on cross-examination  
25 or government witnesses.



Now, in saying that the government must prove its case beyond a reasonable doubt if there is to be a conviction, I do not mean to say that the government is required to prove guilt beyond all possible doubt. Indeed, in human affairs it is hard to think of anything that we can prove beyond all possible doubt with the possible exception of mathematical propositions. But the proof must be of such a convincing character that you would be willing to rely and act on in the most important decisions of your own affairs.

Now, the evidence in this case, as I've told you a number of times, consists of the testimony of the witnesses, the exhibits which have been received in evidence and facts which have been stipulated or agreed to by counsel. You have to decide the case based solely on the evidence. But in your consideration of the evidence you are not limited to the bald statements of the witnesses here or any witnesses in any trial. By using the word "bald" I don't mean to suggest anything about the character of the testimony, but I mean you are entitled to and must think behind the mere words that were uttered.

In deciding the many questions before you, it is your job to determine the credibility of the witnesses who have testified here. Now, how do you go about that? Perhaps the best answer is to say that you determine the

1 truthfulness or accuracy or weight to be given to a witness'  
2 testimony in the same way that you would determine such  
3 questions in your own personal affairs.  
4

5 We are all constantly called upon from day to  
6 day to determine how much confidence we place in the  
7 statements that people make to us. The truthfulness or  
8 dependability of a witness, as that of any other person,  
9 can be determined by his demeanor, that is, his look, his  
10 relationship to the case and to the parties, the possibility  
11 of his being biased or partial or of his not being biased  
12 or partial, the stake that he may have in the outcome  
13 of the case, the reasonableness or unreasonableness of  
14 his statements, the strength or weakness of his recollection,  
15 and the extent to which what he has said has been either  
16 corroborated or contradicted by testimony of other witnesses  
17 or by exhibits or stipulations.

18 Of course, the testimony of a witness may also  
19 be impeached by his own prior inconsistent statements unless  
20 there is some explanation for the inconsistency. In  
21 ordinary life, when you need to determine the truthfulness  
22 of a person, you ask yourself, don't you, as you would here,  
23 how did he impress me? Did his version appear straightforward  
24 and candid, or did he seem to be trying to hide some of the  
25 facts? Did he have any motive to testify falsely or no



b4 2 motive of that kind?

3           The ultimate question for you to decide on in  
4 passing on the credibility of a witness is did he tell the  
5 truth before me. It is for jurors alone to determine the  
6 weight to be given to the testimony of a witness, and  
7 in making these suggestions which I have made I have given  
8 you guidelines only and have not attempted to dictate or  
9 suggest how you should apply those guidelines.

10           It you find that any witness has wilfully testified  
11 falsely as to any material, which means significant, matter,  
12 not some matter which you believe to be unimportant, you  
13 may reject the entire testimony of that witness or you  
14 may accept such portion of it as you believe and reject  
15 the remainder.

16           Now a few rules that apply particularly to this  
17 case. In judging the credibility of any witness, you may  
18 consider whether his testimony was inspired by a motive  
19 or self-interest, personal advantage or hostility to  
20 a defendant so that he gave false or colored testimony  
21 against him, and whether the testimony of such a person  
22 was a fabrication induced by a belief or a hope or an  
23 expectation that he will receive favorable consideration,  
24 such as not being indicted or charged with the offense  
25 itself.

1 jgh15 2114  
2 As you know, the defendants contend that such  
3 motives are true of some of the witnesses here. The govern-  
4 ment has pointed out to you why they believe that that  
5 should not interfere with your accepting the truth of the  
6 witnesses' testimony.

7 In the prosecution of crime the government is  
8 often called upon to use witnesses who are accomplices in  
9 the commission of the crime itself. This is particularly  
10 so in cases of conspiracy. Conspirators do not publicly  
11 proclaim their intentions or operate openly. It often  
12 happens that only members of the conspiracy have evidence  
13 which is relevant to and important in the case.

14 However, experience has shown that accomplices  
15 may be motivated to place the blame on others than them-  
16 selves. Accordingly, an accomplice's testimony should be  
17 carefully scrutinized and checked with the facts which you  
18 find to exist in this case and against the evidence which  
19 may corroborate it, and then you should give the testimony  
20 of the accomplice such value or weight as you deem proper  
21 under the circumstances.  
22  
23  
24  
25



1 gth

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2 By the way, in the federal courts, accomplice  
3 testimony by itself may be sufficient to convict if it  
4 convinces you of the defendant's guilt beyond a reasonable  
5 doubt.

6 Now, it is, of course, proper for you to consider  
7 the interest which a witness has in the outcome of the case.  
8 I do not mean to suggest, however, that a witness who has  
9 an interest in the outcome of the case may not be telling  
10 the truth in spite of his interest, merely to point out  
11 to you that you may consider that factor in determining  
12 what weight to give his testimony.

13 A witness' testimony is, of course, not to be  
14 given any greater or any less weight simply because the  
15 witness is a government witness.

16 Now, ladies and gentlemen, as I have said, your  
17 determination in this case must be made upon the evidence.  
18 There are generally speaking two types of evidence or  
19 two definitions, at least, or categories of evidence from  
20 which you may properly find the facts in the case. I am  
21 sure you have heard them referred to often. One is called  
22 direct evidence. That is the evidence of an eyewitness or  
23 an earwitness. "I have heard it," such a witness would  
24 say, "I have seen it." The other is indirect or more  
25 generally called circumstantial evidence. Circumstantial

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2 evidence is defined as the proof of a chain of events or  
3 circumstances which itself points to the existence or non-  
4 existence of certain facts as to which there was no eye-  
5 witness.

6 The law makes no distinction as to the importance  
7 or weight of circumstantial or direct evidence just because  
8 it is either one or the other. It requires only that you,  
9 the jury, find the facts in accordance with all the evidence  
10 in the case, both direct and circumstantial, beyond a reason-  
11 able doubt.

12 An example, by the way, of the difference between  
13 direct and circumstantial evidence is the following, an  
14 example which is given often to juries in this court but  
15 which is nevertheless, I think, a pretty vivid one and,  
16 therefore, I will use it, too.

17 If you looked out the window, not today, because  
18 it is nice but on a different day, and see it is raining,  
19 that is direct evidence that it is raining.

20 On the other hand, if all the blinds were drawn  
21 in this room and somebody came through the door over there  
22 with a dripping umbrella, that would be pretty good circum-  
23 stantial evidence that it was raining outside. You wouldn't  
24 have seen it with your own eyes, but you would have the  
25 right to infer, seeing a man coming through the door with



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2 a dripping umbrella, that it was raining outside.

3 To be sure, he might have been standing in  
4 the shower in one of the rooms in this building that has  
5 a shower, but that is highly unlikely and the other inference  
6 is the likely one.

7 That, ladies and gentlemen, is an example  
8 given to you to help in making the inferences that you  
9 will have to make based upon the circumstantial evidence  
10 in this case.

11 Members of the jury, both the United States  
12 Attorney and defense counsel have from time to time throughout  
13 the course of this trial, although comparatively rarely,  
14 I must say considering the length of the trial and the  
15 strain that sometimes existed, objected in this case to  
16 the introduction of evidence and addressed arguments to  
17 the bench.

18 It is the duty of attorneys on each side of the  
19 case to make such objections when the attorney believes that  
20 the other side is proposing to put into evidence or ask  
21 questions about something that is not properly admissible.  
22 I want you to know that when I have sustained an objection  
23 to a question or when I have overruled an objection to  
24 a question, that doesn't indicate in any way any attitude  
25 of mine toward the merits or outcome of this case or how

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2 you should decide it. What it means, and the only thing  
3 it means, is that when I have sustained an objection, you  
4 are to disregard the question and draw no inference from  
5 the wording of the question as to what a witness might  
6 have answered had I allowed him to do so.

7 Now, ladies and gentlemen, that I have instructed  
8 you as to the manner in which you should consider the  
9 evidence and since you have heard a very, very long summary  
10 of the respective contentions of defense counsel and the  
11 government, I will turn to the substance of the charges  
12 against the defendants here.

13 The indictment, as you know, contains two counts.  
14 Each count is a separate crime and each of them must be  
15 considered separately by the jury as to each defendant  
16 who is named in that count.

17 This is as good a time as any for me to tell you  
18 that to assist you when you do make your decision one way  
19 or the other, I have prepared what is known as a verdict  
20 list so that when you have reached a conclusion your foreman  
21 can simply fill in a blank of not guilty or guilty as to  
22 the charge of the defendant and you will have recorded your  
23 verdict. I believe it will help you out. Of course, I  
24 will show it to defense counsel before it is delivered  
25 to the jury.



1 gth  
2  
3 The indictment names 11 defendants in all. The  
4 defendants Adams, Coviello, Mecca and Palmer are not, for  
5 reasons which are not of concern to the jury, on trial at  
6 this time. The only persons on trial before you now, of  
7 course, are the seven with whom you have become acquainted,  
8 although, as I will explain to you shortly, in considering  
9 their guilt or innocence you may have to determine the  
10 nature of the participation, if any, of others, that is,  
11 of the co-conspirators or of the co-defendants.

12 In the determination of innocence or guilt on  
13 all the charges, you must bear in mind, as I may have said  
14 before because it is so important, that guilt is personal.  
15 The guilt or innocence of a defendant on trial before you  
16 must be determined separately with respect to him solely  
17 on the evidence presented against him or the lack of evidence  
18 against him. The case of the defendants stands or falls  
19 on the proof or lack of proof of the charges against that  
20 particular defendant and not somebody else.

21 Of course, as you know, the guilt or innocence  
22 of a defendant must be determined beyond a reasonable  
23 doubt solely on the evidence against him.

24 Now, having got that important proposition out  
25 of the way, let me come specifically to the charges.

The charges in this indictment relate to violation

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2 of the United States Code, Sections 812, 841 and 846 of  
3 Title 21.

4 Title 21, Section 841, provides in pertinent  
5 part -- I am reading from the law passed by Congress --  
6 "It shall be unlawful for any person knowingly or intention-  
7 ally to distribute or possess with intent to distribute  
8 a controlled substance."

9 Section 846 makes it a crime to conspire or  
10 agree to commit such crimes, including the crime which I  
11 just read to you.

12 Section 812 defines controlled substances to  
13 include marijuana.

14 Count 1 charges that from August 1, 1971, and  
15 continuing up to and including December 7, 1973, the earliest  
16 date of the filing of these charges by the grand jury,  
17 the defendants -- and I won't read you their names because  
18 you know them -- unlawfully, intentionally and knowingly  
19 conspired and agreed together to distribute and to possess  
20 with the intent to distribute a controlled substance, that  
21 is, marijuana.

22 The indictment further charges that as part of  
23 the conspiracy the defendants wilfully and knowingly would  
24 import marijuana into the United States.

25 Further, the first count of the indictment charges



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2 that the defendants did certain acts called overt or open  
3 acts in furtherance of that conspiratorial agreement.

4 Count 2 charges that in May, 1972, the defendants  
5 possessed with intent to distribute a controlled substance,  
6 that is, approximately 500 pounds of marijuana and, as  
7 you know, from all the summations, the possession of that  
8 amount of marijuana is alleged to have occurred at the Rye  
9 Hilton Hotel in Rye, New York, or the Rye Town Hilton, what-  
10 ever it is, on the date in question.

11 Now let us turn to the first charge, which for  
12 ease of discussion I will call the conspiracy charge.  
13 Before you may convict any defendant under the conspiracy  
14 charge you must find that the government has proven beyond  
15 a reasonable doubt all of the following elements:

16 First, you must find the existence of the con-  
17 spiracy charge. Obviously nobody can be guilty of belonging  
18 to a conspiracy unless there was a conspiracy as charged in  
19 the indictment.

20 Secondly, you must find that the defendant whose  
21 guilt or innocence you are considering at that time knowingly  
22 and wilfully associated himself with the conspiracy or  
23 joined it.

24 Third, you must find that at least one of the  
25 conspirators committed at least one of the so-called overt

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2 acts mentioned in the indictment, and which I will tell  
3 you more about shortly.

4 If the government fails to establish any or  
5 all, whichever way you look at it, of those essential  
6 elements beyond a reasonable doubt, then you must acquit  
7 the particular defendant whose case you are considering  
8 on that point. If it succeeds in proving all those things  
9 as to that defendant, then, of course, it is your duty to  
10 convict that defendant on count 1.

11 Now, the gist of the crime of conspiracy is the  
12 unlawful agreement to violate the law.

13 Ladies and gentlemen, I get worried sometimes  
14 about the instructions which we judges give -- I am departing  
15 from my charge, by the way, in telling you this -- the  
16 instructions which we give you about conspiracy because  
17 I think sometimes we instruct you to a fare-thee-well  
18 and I hope I won't overdo that today. There are a lot of  
19 things that it is important for you to know. But above  
20 all I think you need to have as your mooring for all of the  
21 discussion about conspiracy that a conspiracy is nothing  
22 more nor less than an agreement of two or more people, of  
23 course an intentional and knowing agreement, to violate  
24 the law. And if you bear that in mind, I think all of the  
25 other aspects of the instruction will be much clearer to you.



Whether or not the defendant accomplished what it is alleged he and the others conspired to do is immaterial to the question of his guilt or innocence if a conspiracy does not come to fruition. A conspiracy need not come to fruition, need not be successful in order to constitute an illegal act or crime. It is the very conspiracy itself, together with at least the commission of at least one overt act, that creates the crime.

A conspiracy has often been called a partnership in criminal purposes in which each member, once you are satisfied that somebody became a member, becomes the agent of each other member.

I want to comment on that point there.

You may remember that early in the trial I explained to you that it was not possible always to put evidence in in a particular order that might be ideal and that some evidence might be put in as to a statement with regard to defendant X or by defendant X which might apply to defendant Y, but that it could only be applied to defendant Y if you found that defendant Y was, indeed, a member of the conspiracy. I want to remind you of that instruction again and I will shortly give you an instruction as to how you determine whether a defendant should be adjudged to have been a member of the conspiracy or not.

1 gth  
2 But coming back now to the nature of a conspiracy  
3 itself, to establish the existence of a conspiracy the  
4 government is not required to show that two or more persons  
5 sat around the table and entered into a solemn compact orally  
6 or in writing stating that they formed a conspiracy to  
7 violate the law and setting forth the details of their  
8 plans. It would be pretty darn extraordinary if there  
9 was such a formal document or specific oral agreement.

10 Your common sense will tell you that when a man  
11 undertakes to enter into a criminal conspiracy which, by  
12 definition, means an agreement to violate the law, he is  
13 not going to announce it from the housetops and much is  
14 left to the understanding.

15 Conspirators do not usually reduce their agree-  
16 ments to writing or swear to them before a notary public.

17 It is sufficient if the government establishes  
18 to your satisfaction beyond a reasonable doubt that two or  
19 more persons, that would mean, of course, two or more persons  
20 are the defendant or co-conspirators named in this indict-  
21 ment, in any manner through any contrivance impliedly or  
22 tacitly or explicitly came to a common understanding to  
23 violate the law. Express language or specific words are  
24 not required to indicate assent or attachment to a con-  
25 spiracy, nor is it required that you find that all of the



1 conspirators alleged in the indictment joined in the con-  
2 spiracy in order to find that the conspiracy existed, but  
3 obviously you must find that at least two people did or you  
4 can't have a conspiracy.  
5

6 In determining whether there has been an unlawful  
7 agreement, you may judge the acts and conduct of the alleged  
8 conspirators which are done to carry out an apparent criminal  
9 purpose. The maxim that action speaks louder than words  
10 is applicable here, as it often is in human conduct.

11 Often the only evidence available is that of  
12 disconnected acts which, however, when taken together and  
13 in connection with each other may show a conspiracy to secure  
14 a particular result as satisfactorily and as conclusively  
15 as more direct proof.

16 The offense is complete when the unlawful agree-  
17 ment is made and after any single overt act to effect  
18 the object of the conspiracy is thereafter committed by  
19 at least one of the co-conspirators.

20 Proof concerning the accomplishment of the  
21 conspiracy may be the most persuasive evidence of the  
22 existence of the conspiracy. So if you believe that the  
23 venture alleged here existed and was successful, the  
24 success itself may be the best proof of the existence of  
25 the agreement.

1 gth  
2 In determining whether the conspiracy charged  
3 here did actually exist, you may consider the evidence of  
4 the acts and conduct of the alleged conspirators as a  
5 whole and the reasonable inferences to be drawn from such  
6 evidence. If upon consideration of the evidence you find  
7 beyond a reasonable doubt that the minds of at least two  
8 of the alleged co-conspirators met in an understanding way  
9 and that they agreed as I have explained to work together  
10 in furtherance of the alleged unlawful scheme, then proof  
11 of the existence of the conspiracy is complete. That is the  
12 first element.

13 Now, as you know -- and I am still talking about  
14 the first element, that is the conspiracy itself -- as  
15 I have said, the indictment charges and the government  
16 contends that the evidence adduced during the trial reveals  
17 a single conspiracy.

18 If you find that the evidence establishes that  
19 a number of steps and transactions were required in order  
20 to accomplish the goals of the conspiracy charged in the  
21 indictment and that all of the activities involved in these  
22 transactions were coordinated nevertheless by a central  
23 aim or purpose and that there was a nucleus of persons who  
24 had a basic community of purpose throughout all the trans-  
25 actions, then that would amount to a single overall



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2 conspiracy. This would be so even though there may have  
3 been a division of labor in fulfilling the objects of the  
4 conspiracy.

5 On the other hand, if you find that the evidence  
6 does not show one overall conspiracy but, instead, shows  
7 the existence of a number of separate and independent  
8 conspiracies, each with its own aims and objectives and  
9 each with his own separate nucleus or corps of conspirators,  
10 then you would have multiple conspiracies and the government  
11 would have failed to establish the single overall conspiracy  
12 as charged and in that event you would have to acquit  
13 the defendants on the charge of conspiracy.

b3 14 Moreover, even if you find that the government  
15 has proven a single overall conspiracy, you must then  
16 determine -- and this is the second element -- whether  
17 any particular defendant has become a member of it knowingly  
18 and wilfully in order to find that defendant guilty.

19 Let us talk about this second element, that is,  
20 membership in the conspiracy, individual membership in  
21 the conspiracy.

22 You cannot find Mr. X guilty of count 1 unless  
23 you find that Mr. X knowingly joined the conspiracy.

24 Let me be more specific for you. If you conclude  
25 that the conspiracy charged in this indictment existed, you

1 must next determine whether the defendant whose guilt  
2 you are considering or, rather, whose case you are con-  
3 sidering was a member or became a member, whether he  
4 participated in the conspiracy with knowledge of its un-  
5 lawful purpose and in furtherance of its unlawful ob-  
6 jectives.  
7

8 To find a defendant's membership in a conspiracy  
9 you must find that he knowingly and intentionally parti-  
10 cipated in it. Thus, mere knowledge by a defendant of  
11 the existence of a conspiracy or of any illegal act on the  
12 part of another alleged co-conspirator or mere association  
13 with one or more of the co-conspirators is not sufficient  
14 in itself to establish membership. The government must  
15 establish beyond a reasonable doubt that the defendant  
16 under question was aware of the basic purposes and objects  
17 of the conspiracy, that he entered into it with a specific  
18 criminal intent and that was with the purpose to violate  
19 the law.

20 So if a defendant with an understanding of the  
21 unlawful character of the conspiracy intentionally engages,  
22 advises or assists for the purposes of furthering it,  
23 then he becomes a knowing and wilful participant or con-  
24 spirator.

25 Whether or not a defendant was a member of the



1 conspiracy or joined the conspiracy must be determined--  
2 I believe I may have said this before but I will stress  
3 it again -- on the evidence as to his own actions, his own  
4 conduct, his own statements and declarations, his own con-  
5 nection with the acts and conduct of the other alleged  
6 co-conspirators.  
7

8 The guilt of a co-conspirator, if you find that  
9 there was a conspiracy and he joined it, is not governed  
10 by the extent or duration of his participation in the  
11 conspiracy or whether he had knowledge of all of its  
12 operations. Even if one joined the conspiracy after it  
13 was formed and was engaged in it to a degree more limited  
14 than that of some other co-conspirator, he may still be  
15 found guilty of conspiracy.

16 Each member of the conspiracy may perform, and  
17 usually does, separate and distinct acts at different  
18 times in different places. Some conspirators obviously  
19 play more important roles than others. But it is not  
20 required for the proof of the elements we have been talking  
21 about that a person be a member of the conspiracy from  
22 its very start or that he do everything that was done  
23 within the conspiracy. He may join it at any point  
24 during its progress and he would then be held responsible  
25 for all that has been done before he joined and all that

1 gth

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2 would be done by the conspirators in pursuance of the  
3 conspiracy thereafter during its existence and while he  
4 remains a member.

5 Simply stated, again using the partnership  
6 analogy, a partner assumes the liabilities of the partner-  
7 ship, including those that occurred before he became a  
8 member. Thus, if you find that a given defendant is  
9 a conspirator, that is, became a member of it knowingly,  
10 then however limited his role in furthering the objectives  
11 of the conspiracy, he is responsible for all that was done  
12 in furtherance thereof before or during the conspiracy  
13 while he is a member.

14 Now we come to the last element with regard  
15 to the conspiracy, that is, the question of overt acts.

16 Assuming that you have found that the conspiracy  
17 charged existed and that a defendant whom you are considering  
18 was a member of that conspiracy or became a member of  
19 it knowingly, then the question arises whether any of  
20 the co-conspirators committed at least one of the overt  
21 acts charged in the indictment in furtherance of the con-  
22 spiracy.

23 The purpose of requiring proof of an overt act  
24 is not inconsequential. It is that while parties may  
25 conspire and agree to violate the law, they could and they



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2 do change their minds and do nothing to carry out that  
3 plan. In that case no crime would be committed.

4 You and I can sit here and even plan to blow  
5 up the capital of the United States and talk about it for  
6 days on end, but if we never do anything about it, that  
7 is not a crime. The moment, however, that one of the co-  
8 conspirators does something in furtherance of the crime,  
9 then the crime is complete.

10 Now, it is true that overt acts as listed in  
11 the indictment generally speaking are not necessarily  
12 criminal in themselves. That does not mean, however, of  
13 course, that an action taken may not be sufficiently  
14 weighty to be in furtherance of the crime.

15 If I phone you in connection with our plan to  
16 blow up the capital of the United States and suggest that  
17 we meet at a certain time and place, while it may be  
18 perfectly normal and not criminal to telephone people,  
19 that would be an act in furtherance of the conspiracy.

20 An overt act need not be a criminal act nor  
21 the very crime which is the subject of the conspiracy.  
22 The government is not required to prove that each member  
23 of the conspiracy committed or participated in any particular  
24 overt act since the act of any one conspirator done in  
25 furtherance of the conspiracy becomes the act of all the

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2 other members.

3 Moreover, the government is not required to  
4 prove each of the overt acts that are alleged in the in-  
5 dictment, it is sufficient if it proves the commission of  
6 at least one of the acts by one of the co-conspirators in  
7 the Southern District of New York, which includes Rye, New  
8 York.

9 The overt acts here I will read to you so that  
10 you will be acquainted with them in case you have any  
11 difficulty in interpreting the indictment when you have it  
12 in your possession.

13 I am deliberately omitting overt act 1, which  
14 I have stricken from the indictment.

15 2. In or about February, 1973, the defendants  
16 James Adams, Dominic Mecca and Richard Belanger met and  
17 had a conversation in Florida.

18 3. In or about February, 1973, the defendant  
19 James Adams paid the defendant Robert Wilner approximately  
20 \$12,000.

21 4. In or about February, 1973, defendant Robert  
22 Wilner as agent for Air Seas Charter Services, Inc., purchased  
23 a 24-foot Floton Seacraft boat in Fort Lauderdale, Florida.

24 5. On or about March 6, 1973, defendant Steven  
25 Smith and co-conspirator Richard Thurlow boarded a boat in



1 gth

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2 Miami, Florida.

3 6. On or about March 7, 1973, defendant Steven  
4 Smith and co-conspirator Richard Thurlow possessed approxi-  
5 mately 700 pounds of marijuana on Williams Island, Bahama  
6 Islands.

7 7. On or about May 13, 1973, defendants Robert  
8 Wilner and John Doe, also known as Anthony, boarded an  
9 airplane at John F. Kennedy International Airport in the  
10 City of New York and flew to Fort Lauderdale, Florida.

11 8. In or about May, 1973, defendant John Doe,  
12 also known as Anthony, and co-conspirator Gerald Mitchell  
13 drove from Fort Lauderdale, Florida, to the Rye Town Hilton  
14 Hotel in Port Chester, Westchester County, New York.  
15  
16  
17  
18  
19  
20  
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22  
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24  
25

1 gth 1

b4 2 Ladies and gentlemen, I said before that Rye  
3 was in the Southern District of New York as it is, but  
4 I now see that the Rye Town Hilton is in Port Chester,  
5 New York, and I instruct you that Port Chester is also  
6 in the Southern District of New York.

7 Again, in or about May, 1973, defendants Robert  
8 Wilner, Dominic Mecca and John Doe, also known as Anthony,  
9 and co-conspirator Gerald Mitchell met at the Rye Town  
10 Hilton Hotel in Port Chester, Westchester County, New York  
11 and had a conversation.

12 10. In or about June, 1973, defendants Robert  
13 Vissa and Nicholas Calabro and co-conspirator Gerald  
14 Mitchell drove from the State of Maine to Stamford, Con-  
15 necticut where they met and had a conversation with  
16 defendants John Doe, also known as Anthony, and Robert  
17 Wilner.

18 11. On or about June 10, 1973, the defendants  
19 John Doe, also known as Anthony, and Gary Stephan boarded  
20 a boat in Fort Lauderdale, Florida.

21 12. On or about June 11, 1973, defendant Robert  
22 Wilner and co-conspirator Gerald Mitchell landed an airplane  
23 on Long Island in the Bahama Islands.

24 13. On or about June 11, 1973, defendants Richard  
25 Palmer and Robert Vissa landed an airplane on Long Island



1 gth2

2 in the Bahama Islands.

3 14. In or about June, 1973, defendants Paul  
4 Stephan, Dominic Mecca, Nicholas Calabro, Robert Wilner,  
5 Robert Vissa and Richard Palmer and co-conspirator Gerald  
6 Mitchell met at Pier 66 hotel, Fort Lauderdale, Florida,  
7 and had a conversation.

8 15. In or about June, 1973, defendants Gary  
9 Stephan and John Doe, also known as Anthony, returned to  
10 Fort Lauderdale, Florida, by boat.

11 16. In or about June, 1973, co-conspirator  
12 Gerald Mitchell possessed approximately 260 pounds of  
13 marijuana.

14 Ladies and gentlemen, I have completed the  
15 definition of the elements of conspiracy which is the  
16 charge contained in count 1. I do want to say this:

17 While the indictment charges that the conspiracy  
18 existed from on or about the 1st day of August, 1971,  
19 and continuously thereafter up to and including December,  
20 1973, which is the date of the filing of the indictment,  
21 it is not essential as a matter of law that the government  
22 prove that the conspiracy started and ended precisely on  
23 those dates, it is sufficient if you find that, in fact,  
24 a conspiracy was formed and existed for some time within  
25 the period set forth in the indictment and that at least

one of the overt acts was committed in furtherance of the conspiracy during that period.

A conspiracy, once formed, is presumed to have continued until its object is accomplished or until there is an affirmative act of termination by its members or it is otherwise clearly terminated, as, for example, by arrest of the defendant.

So, too, once a person is found to be a member of a conspiracy, he is presumed to continue his membership until the termination of the conspiracy, unless there is affirmative proof of his withdrawal or his disassociation from it.

Now, ladies and gentlemen, I have finished instructing you with regard to conspiracy. We come now to the law with regard to count 2.

The second count of the indictment, that is, the substantive count, as we call it, charges the defendants with the unlawful possession with intent to distribute 500 pounds of marijuana.

Before you can find any defendant guilty on count 2, you must be convinced beyond a reasonable doubt that the government has proven all of the following elements of the crime.

First, that on or about the date alleged, which



1 gth4

2 is May, 1973, the defendant under consideration possessed  
3 with the intent to distribute the marijuana specified  
4 in the count.

5 Second, that the substance possessed with intent  
6 to distribute was marijuana.

7 And third, that the defendant under consideration  
8 did what he did unlawfully, wilfully and knowingly.

9 You will note that the first element of the  
10 offense is to possess with intent to distribute. What does  
11 that phrase mean? Well, the word distribute means, as you  
12 would expect it to, to transfer or deliver other than by  
13 administering or dispensing a controlled substance. In  
14 other words, there are legitimate ways to dispense controlled  
15 substances and we are not talking about those.

16 It is not necessary that the government prove  
17 that the defendant actually controlled the substance, but  
18 only that he possessed it with the intent to distribute it  
19 on or about the date charged.

20 Ladies and gentlemen, that instruction is not  
21 accurate and I ask you to strike that.

22 It is necessary to show that he possessed it  
23 with the intention to distribute it, and I will talk about  
24 control of the marijuana in a moment.

25 The law recognizes two kinds of possession and

1 gth5

2 I think probably we do in our daily lives, too, although  
3 we are not so conscious of it.

4 First is actual possession. I have this  
5 piece of paper in my hand. I actually possess it. A person  
6 who knowingly has direct physical control over a thing  
7 at a given time is then in actual possession of it. But  
8 a person who, although not in actual possession, has the  
9 power, the power at a given time to exercise dominion or  
10 control over a thing, is then in what the law calls con-  
11 structive possession of it.

12 The law recognizes, also, that possession may be  
13 sole or joint, that is, a thing may be possessed by one  
14 person or by more than one person. If one person alone  
15 has actual or constructive possession of the thing, possession  
16 is sole. If more than one person does, then it is joint.

17 If you find from the evidence beyond a reasonable  
18 doubt that any of the accused either alone or jointly with  
19 others had actual or constructive possession of the substance  
20 as described in count 2, then you may find that that substance  
21 was in the possession of the accused within the meaning  
22 of the statute.

23 The word intent, that is, with intent to distribute,  
24 refers to a person's state of mind, of course, so the term  
25 to possess within intent to distribute can be fairly stated



1 gth6

2 to mean to possess or control an item with the state of  
3 mind or purpose of transferring or deliverng that item.

4 That is the first element of count 2.

5 The second element you must find beyond a  
6 reasonable doubt with regard to count 2 is that the substance  
7 referred to in count 2 was, indeed, marijuana. I instruct  
8 you as a matter of law that marijuana is a controlled sub-  
9 stance, but you must find that the substance which is re-  
10 ferred to in count 2 was marijuana and you must make such  
11 a finding, of course, as you do all your other findings,  
12 beyond a reasonable doubt. I will say more about that  
13 hereafter.

14 The third element which you must find as to count  
15 2 if you are to convict any defendant is that the possession  
16 of the marijuana occurred wilfully, knowingly and intention-  
17 ally. These words mean that you must be satisfied beyond  
18 a reasonable doubt that the defendant whose guilt you are  
19 considering knew what he was doing and he did it deliberately  
20 and voluntarily as opposed to mistaken or accidentally  
b5 21 or under a mistaken assumption.

22 Now, knowledge and intent exist in the mind. It  
23 is not possible to look into a person's mind physically to  
24 see what goes on there. The only way you have for arriving  
25 at a decision on such questions is to take into consideration,

as you do all the time in your daily lives, the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were proven to you beyond a reasonable doubt.

Direct proof of knowledge is unnecessary. Of course, if there were such proof it would be the best there could be, but the only way you could get direct proof of a person's intention is for him to have said or somebody else to have testified that he said, "I meant to do that." That rarely occurs. But knowledge and intent may be inferred from all the surrounding circumstances.

Now, there are two other alternate bases beyond those that I have described to you on which findings of guilt may be found as to count 2, but it still requires proof of the high degree which I have previously mentioned, that is, beyond a reasonable doubt.

Any person who commits an act in violation of a criminal statute, of course, commits a crime. But it is also a crime not only to commit an illegal act, but to aid or abet another person to commit that crime. The second crime, if you want to call it a crime, or the second basis to be held liable for a crime is the legal principle that anyone who aids and abets another one to commit an illegal



1 jgh 1

2 act is also guilty of committing that act.

3 Accordingly, if you should find beyond a reasonable  
4 doubt that any of the defendants named in count 2 or any  
5 of their co-conspirators committed the crime charged in  
6 count 2 and that another defendant aided or abetted that  
7 defendant, you would have a sufficient basis for finding  
8 the guilt of the second person as to count 2.

9 Now, what does aid and abet mean? To find  
10 that a defendant aided or abetted another to commit a crime,  
11 you must find that the allegedly aiding and abetting  
12 defendant in some positive, clear way associated himself  
13 with the criminal venture, that he participated in it  
14 not just casually but as something he clearly wished to  
15 bring about. In other words, you must find that he sought  
16 by his actions to make the venture succeed.

17 Thus, in order to find the defendant guilty of  
18 aiding and abetting, you must of course find something  
19 much more than mere knowledge on his part that a crime  
20 was being committed. For a mere spectator at a crime is  
21 not a participant, however unfortunate his conduct may be.  
22 If you stood watching somebody else hold up a man with  
23 a gun, you would not be, by that alone, aiding and abetting  
24 that man. In order to convict, it is not necessary, however,  
25 that you find that the defendant himself did the acts.

1  
2 There is, finally, another alternative basis  
3 upon which you may find a defendant named in count 2  
4 guilty. This alternative basis is as follows: If you  
5 find beyond a reasonable doubt that the offense charged  
6 in count 2 was committed by one of the defendants who was  
7 a member of the conspiracy, and that another defendant  
8 was then a member of the conspiracy and that the acts  
9 which constituted the offense in count 2 were done in  
10 furtherance of the conspiracy of which B was a member,  
11 B being the second defendant, and that the second defendant  
12 might reasonably have foreseen that those very acts would  
13 be done by the first defendant, then you may find that the  
14 second defendant is guilty of the offense alleged in count  
15 2 even though he didn't personally participate.

16 Let me be more specific. If you and I agree  
17 to commit an illegal act, and if you go ahead and actually  
18 commit that act, and if that act was in furtherance of  
19 our conspiracy and I could reasonably tell that as part  
20 of this conspiracy you would commit that act, then even  
21 if I didn't help you, I may be found guilty of having  
22 committed that act.

23 Now, ladies and gentlemen, as you know, there  
24 has been evidence in this case, at least on one occasion,  
25 when Richard Palmer met with Robert Wilner and another



1 jgh 3

2 occasion, when Palmer met with Robert Wilner, Mecca and  
3 Belanger, that he was equipped with recording devices,  
4 and you've heard tapes resulting from that.

5 I am instructing you as a matter of law, and  
6 I think I took this up with you at the beginning of the  
7 trial, before you were chosen as jurors, that the use of  
8 such devices in the manner described in this case is entirely  
9 within the law and does not violate anyone's rights. This  
10 is because Richard Palmer, who was a participant in the  
11 conversations, consented to have them recorded. Accordingly,  
12 whatever your private views may be as to the desirability  
13 or undesirability of the law's policy on that subject,  
14 you must be governed by the law, which is that there is  
15 nothing illegal about such recording.

16 One or two more items to bring to your attention.  
17 I told you earlier that you must under count 2 determine  
18 to your satisfaction beyond a reasonable doubt that the  
19 substance possessed at the Rye Hilton Hotel in May, 1973,  
20 was marijuana. I instruct you, as I told you before, that  
21 marijuana is a controlled substance.

22 Now, just as with any other component of a crime,  
23 the existence of and dealing with marijuana may be proven  
24 by circumstantial evidence. There need be no sample placed  
25 before the jury, nor need there be testimony, although

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2 there was some, by chemists, as long as the evidence  
3 furnishes a base for inferring that the material in  
4 question was marijuana. The evidence is before you and  
5 you have to determine whether you are satisfied beyond  
6 a reasonable doubt on that point.

7 Ladies and gentlemen, in every criminal case  
8 there is a fundamental rule which every defendant has the  
9 right to rely on. That is the rule that no defendant may  
10 be compelled to take the witness stand or offer any testimony  
11 whatsoever. Pleading not guilty, a defendant has in effect  
12 denied the charges on which he is being tried and denied  
13 every material issue against him stated in the indictment.  
14 It is the prosecution which must prove him guilty, and  
15 he cannot be required to testify or to disprove anything.

16 Any accused person has the right to stand mute.  
17 The fact that he does not take the stand, as the defendants  
18 in this case have not, may not be considered by you as any  
19 indication of guilt or as an admission of guilt or as  
20 evidence or an inference of guilt.

21 Now, that's not just an artificial rule. If  
22 you were accused of a crime, you would feel that there was  
23 no reason for you to prove your innocence. However thorough  
24 you might be convinced of that innocence or knew of it,  
25 you would understand that it was the government's job to



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2 prove you guilty if it could, not as a contest but if  
b2 3 that's what the facts are.

4 Ladies and gentlemen, I've come near the end  
5 of my formal instructions, but in a sense the most im-  
6 portant part of the case is the part which you now are to  
7 play as jurors, because it is for you and you alone to  
8 decide whether any of the defendants are guilty on either  
9 of the counts charged.

10 I know that you'll try the issues that have been  
11 presented to you in accordance with the serious oath that  
12 you took as jurors, in which you promised that you would  
13 well and truly try the issues joined in this case and,  
14 as you probably remember from my repeating it time after  
15 time when I was impaneling this jury, based solely on the  
16 evidence which you have had put before you in this courtroom  
17 and the instructions as to the law which I am now concluding  
18 in giving you.

19 I like that phrase "well and truly try the  
20 issues joined in this case" - it goes back a thousand years,  
21 and it's old fashioned flavor should mean something to you  
22 and remind you of the hundreds of thousands of juries who  
23 have performed this function before you - and that "you  
24 must a true verdict render based upon the evidence you  
25 heard in this court and the exhibits."

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2 In order for you to reach a verdict of either  
3 not guilty or guilty as to any defendant on either count,  
4 your verdict must of course be unanimous. That is, every-  
5 body must agree as to that particular verdict.

6 Now, in spite of that requirement of unanimity,  
7 each of you must decide each count as to each defendant  
8 individually in accordance with your own consciences, but  
9 only after deliberation with your fellow jurors to determine  
10 whether you believe a just verdict is being reached. You  
11 shouldn't hesitate to change your mind if you become  
12 convinced that your original view of the case was not in  
13 accordance with the facts and the law. On the other hand,  
14 you should not change your minds just for the purpose of  
15 reaching a verdict as a matter of convenience.

16 I haven't any reason to believe that this jury  
17 won't be able to reach a unanimous verdict one way or the  
18 other as to the matters put before it.

19 To sum up, if you find there is a reasonable  
20 doubt that the law has been violated, you should not hesitate  
21 for any reason to find a verdict of acquittal. But on the  
22 other hand, if you find that the law has been violated  
23 as charged, you should not hesitate because of sympathy  
24 or any other reason to render a verdict of guilty.

25 Nothing that I have said in these instructions,



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2 and I stress this, whatever it may be, is intended to  
3 indicate any view of mine towards how the various issues  
4 put before you should be decided.

5 Now, ladies and gentlemen, according to custom,  
6 juror number 1 normally acts as the foreman of the jury.  
7 Our friend juror number 1 here has expressed to me the  
8 wish that he should not serve, and I am honoring his wish.  
9 I have spoken to Mrs. Taxman, who is juror number 2, and  
10 told her that for the purposes of objectivity and not  
11 trying to choose or pick among you I would like to see that  
12 she serves as forelady, and she has kindly agreed that she  
13 would. That doesn't mean that she has any authority that  
14 the rest of you do not have but just that she will assist  
15 in seeing to it that your deliberations are orderly and  
16 that all communications to the court are properly made.

17 Mrs. Taxman, I understand that you have once before  
18 served as a forelady and I'm glad to know that. You will  
19 remember that you have the right at any time, and I am  
20 telling this to all of you ladies and gentlemen, to ask  
21 for the exhibits or any one of them. You have the right  
22 to have any of the testimony read to you or any of the  
23 tape exhibits played for you. You have the right to put  
24 any questions that you want to the court.

25 If you do wish to have any testimony read back to

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2 you or any other exhibit, it would be helpful if you could  
3 be as specific as possible about the material that you  
4 are interested in so that we can be assisted in locating  
5 that material. And, of course, the way that you will get  
6 in touch with us will be to give a note to the marshal,  
7 who will be standing outside the door of your jury room.  
8 I am neither encouraging nor discouraging your asking  
9 for things but certainly want you to have whatever you want.

10 It is not my practice, ladies and gentlemen, to  
11 send in all of the exhibits, plunk them down on the jury  
12 room table and leave them there. However, if you would  
13 prefer, when you start your deliberations, to have all  
14 of the exhibits before you, all you have to do is to write  
15 a note saying you want all the exhibits. And if, on the  
16 other hand, you just want some of the exhibits, you can  
17 ask for them.

18 I will also say, because sometimes a jury asks  
19 that the judge's charge be sent in to them, that I will  
20 not send my charge in to you. I hope it has been clear.  
21 But if it has not been clear, then I am afraid it would  
22 be less clear if I sent it in to you and you all tried  
23 by yourselves to figure out what it meant. If you have  
24 any questions as to what my charge is, simply write me a  
25 note saying you have a question and come on out and tell



1 jgh9  
2 me what your question is or specify the question in your  
3 notes. Counsel and I will sit down and talk about it  
4 and, I believe, will agree on what the answer is. Fortunately  
5 for me, if we don't agree, then I will tell you what the  
6 law is.

7 Ladies and gentlemen, I have now come to the  
8 end of my instructions. I want to confer with counsel  
9 in the robing room and see whether they feel that anything  
10 I have said requires clarification. It won't take us  
11 very long. Please remain in the jury box and we will be  
12 right back.

13 (In the robing room.)

14 MR. SHAW: Your Honor, before we take up the  
15 charge, I would just like to list an objection to the  
16 summation, and that was the comment from the prosecutor,  
17 "heard from Smith." I would point out that --

18 THE COURT: I've pointed out that the prosecutor  
19 immediately indicated that that was incorrect, and whatever  
20 motion you are making with regard to that is denied as  
21 in my belief not prejudicial. But I understand the reason  
22 for your making the motion.

23 MR. THAU: Since Mr. Shaw referred to summations,  
24 I will also. You will remember that there came a point--

25 THE COURT: Gentlemen, I am sorry to interrupt,

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2 MR. TRUEBNER: Will your Honor send a copy  
3 of the indictment in? I just want to make clear that we  
4 are working with an amended indictment in the sense that  
5 even though a superseder was never filed counsel all agreed  
6 that the indictment that was filed contained the words  
7 "narcotic drug controlled substance."

8 THE COURT: I remember that. That was changed.

9 MR. TRUEBNER: I have a clean copy here. We  
10 can excise over that number 1 with a pair of scissors or  
11 we can block it out or just cut out a little box there  
12 if we have a pair of scissors. Maybe the clerk has one.

13 THE COURT: We can do that immediately after  
14 they are going.

15 MR. LANNA: Can we come back in later after the  
16 government's summation?

17 THE COURT: Yes.

18 (In open court.)

19 THE COURT: Two points here.

20 Both sides would like me to amplify what I  
21 had to tell you about the tapes in various ways. The first  
22 remark I want to make is that of course the existence of  
23 the tapes, the reliability of the tapes is a matter of fact,  
24 and being a matter of fact it is for you to decide how  
25 reliable they are.



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2 Second, I want to remind you that because I  
3 mentioned certain conversations involving Mr. Wilner,  
4 Mr. Belanger and Mr. Palmer did not mean to suggest that  
5 the tapes played as to conversations between Mr. Mitchell  
6 and Mr. Mecca and including Mr. Vissa are not also legal.  
7 Of course they are, because Mr. Mecca consented to their  
8 being taped in the same way that Palmer consented as to  
9 the other tapes.

10 Finally, the fact that I gave you an instruction  
11 about any of these tapes, and in particular about the  
12 tape of an alleged meeting at which Mr. Wilner, Mr. Belanger  
13 and Mr. Palmer were present does not mean that I am saying  
14 that that meeting is proven or disproven. I am not commenting  
15 on whether the meeting occurred. I am just commenting on  
16 the legality of the tapes.

17 Now, one of the counsel was somewhat concerned  
18 that you might think, as a result of what I explained to  
19 you about the nature of an overt act and the requirement  
20 that it be proven that one of the co-conspirators committed  
21 an overt act -- they were worried that you might think that  
22 the commission of an overt act is in itself a crime.

23 I think I pointed out to you that you may commit  
24 an overt act without committing a crime. And even in the  
25 situation here, if you did not know that the overt act you

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2 were committing was in furtherance of the crime, you,  
3 yourself, of course, would not be guilty. In other words,  
4 the commission of an overt act must be knowing. The  
5 person doing it must know that it is in furtherance of  
6 the conspiracy, in order for it to be legally effective.

7 I think I have covered all of the points that  
8 counsel asked me to take up with you at this time. Have  
9 I not, gentlemen?

10 And I am therefore ready for you to commence  
11 your duties, ladies and gentlemen, with one exception.

12 Does anybody want to look at this list before  
13 I hand it over to Mrs. Taxman? There is nothing unusual  
14 about it.

15 I will ask the clerk, then, to deliver this verdict  
16 list to Mrs. Taxman and I will ask him after that to swear  
17 the marshal.

18 Oh, there is one further duty that I have. I  
19 remember that Mr. Whitman asked me when we started the trial  
20 in this case what an alternate juror did. Now, Mr. Whitman,  
21 yes, you have now done what an alternate juror does. You  
22 have sat through the entire trial. And since all 12  
23 of the regular jurors are here, it is with regret in the  
24 sense that I excuse, but also with very deep thanks that  
25 I excuse, you and and Mr. De Carlo. The law doesn't permit



the alternate jurors to deliberate with the regular jurors but only to substitute for them if any of them are absent.

I hope that you won't feel frustrated in not being able to deliberate, but I certainly do thank you and Mr. De Carlo for the really exceptional behavior that you and all the other members of this jury showed. Counsel said it and I've heard counsel butter up juries before, but I'll do it this time and I have nothing to gain. And it is true; this has been the promptest, most regular, most attentive jury that I've seen in the court in a long time, and I am now beginning to have been here long enough to be entitled to say that.

Thank you, gentlemen, and you two are excused.

(Two alternate jurors discharged.)

(A United States Marshal was sworn.)

THE COURT: Ladies and gentlemen, you may now commence your deliberations. I want to tell you ladies and gentlemen that I will make arrangements, which I believe we can do here in court, if you go home after dark, for transportation in a car. So you need not be concerned. We can arrange that.

All right, ladies and gentlemen, you may commence your deliberations, please, and I will see counsel in the robing room.

(At 3:42 P.M. the jury retired to commence their deliberations.)

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2 (In the robing room.)

3 THE COURT: Gentlemen, before we go to your  
4 objections, I would like to say that I will go up to  
5 chambers as soon as we are finished with the motions or  
6 whatever they are.

7 As far as exhibits are concerned, I don't see  
8 any reason why there should be any problem. If the jury  
9 asks for any exhibit, I assume you will be able to agree  
10 and just let the clerk give it to the marshal.

11 If any questions are asked with regard to my  
12 charge, or any other legal questions, I will of course come  
13 down and answer them after having conferred with you.

14 If there are requests for the reading of any  
15 portion of the record or the playing of any tapes, I would  
16 like to ask you to do the leg work necessary to locate  
17 the information before I come down. And where in your  
18 opinion there is no real question as to what the jury wants  
19 to hear, I would just as soon not come down to hear it.  
20 But if you feel that there are going to be questions that  
21 I have to decide as to whether more or less should be read  
22 or whether the cross-examination should be read, of course  
b5 23 I will come down.

24 MR. LANNA: I will move at this time for the  
25 withdrawal of a juror and a mistrial as a result of the



Certificate of Service

November 27, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

E. R. Doyle